Freescale Semiconductor (M) Sdn Bhd v Edwin Michael Jalleh & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01–160 OF 2010
ABDUL WAHAB PATAIL, CLEMENT SKINNER JJCA AND MAH WENG KWAI J
5 JUNE 2013

Civil Procedure — Appeal — Appeal to Court of Appeal — Appeal against decision of High Court in upholding decision of Industrial Court — Allegations of misconduct at workplace — Employee dismissed due to allegations of sexual harassment — Whether termination with just cause or excuse — Whether punishment of dismissal harsh — Employee awarded backwages and compensation in lieu of reinstatement — Whether award of Industrial Court appropriate — Whether warranted discretionary exercise of judicial review by High Court — Industrial Relations Act 1967 s 20

The first respondent was a senior manufacturing supervisor at the appellant company who was given notice to show cause due to two allegations of sexual harassment. The first respondent denied the allegations. A domestic inquiry which was convened, dismissed the second allegation but found the first allegation to be proved and subsequently, the first respondent's employment was terminated. The first respondent then proceeded to claim against the appellant pursuant to s 20 of the Industrial Relations Act 1967 and submitted that the termination was without just cause or excuse and therefore sought, inter alia, reinstatement. The Industrial Court held that the first respondent's dismissal was without just cause or excuse and ordered that the first respondent be accorded with backwages and compensation in lieu of reinstatement amounting to RM248,768. The Industrial Court also found the punishment of dismissal to be too harsh. The appellant applied for judicial review at the High Court to quash the award of the Industrial Court but the application was dismissed. In the present appeal, the appellant appealed against the decision of the High Court which upheld the Industrial Court's award.

Held, setting aside the order of High Court and award of Industrial Court:

(1) The germane consideration in industrial relations is that the remedy imposed is warranted and not disproportionate to the misconduct committed. Consideration must be taken not only of matters concerning the interests of the party who committed the misconduct, but also the whole of the circumstances in the interests of maintenance of good industrial relations in the workplace (see para 15).

(2) Although the Industrial Court was not wrong in taking into consideration the matters that it did, it failed to take other equally relevant matters into consideration. The misconduct in this case was misconduct if committed by a peer in the workplace. That the misconduct was committed by a superior increased the magnitude of the misconduct, as it invited the implication he was taking advantage of his subordinate who might be afraid to complain. That the misconduct was committed in a place where a saw machine was used suggested a certain disregard for safety. That it was committed in full view of other employees did not make it any less objectionable. It merely excluded suspicions of worse things. The victim was also fully-attired and protected by her work clothes. The misconduct was not of any inadvertent or accidental physical contact, but willful. Quite clearly the Industrial Court had failed to exercise its jurisdiction fairly or justly and this warranted the exercise of the supervisory jurisdiction of judicial review (see paras 16–17).

(3) The required remedy was that the misconduct would not occur again. There was no effort to apologise. There was no evidence of any such apology and that such apology was accepted by those in the workplace. Instead, the first respondent's defence was of denial. It implied a lack of contriteness. Quite correctly reinstatement could not be considered as it would put the first respondent into the same position. It would have implied he committed no misconduct. However, an award in lieu of reinstatement imposed a punishment upon the appellant for seeking to remedy misconduct in the workplace, when the misconduct was not the act of or contributed to by the appellant, but solely the personal act of the first respondent (see para 18).

[Bahasa Malaysia summary

Responden pertama adalah penyelia kanan kilang syarikat perayu yang diberi notis untuk tunjuk sebab akibat daripada dua tuduhan gangguan seksual. Responden pertama menafikan tuduhan-tuduhan tersebut. Siasatan domestik yang diadakan, menolak tuduhan kedua tetapi mendapati tuduhan pertama dibuktikan dan kemudiannya, pekerjaan responden pertama ditamatkan. Responden pertama kemudiannya meneruskan untuk menuntut terhadap perayu berikutan s 20 Akta Perhubungan Perusahaan 1967 dan berhujah bahawa penamatan tersebut adalah tanpa sebab dan alasan adil dan oleh itu memohon, antara lain, pengembalian kerja. Mahkamah Perusahaan memutuskan bahawa pembuangan kerja responden pertama adalah tanpa sebab dan alasan adil dan memerintahkan bahawa responden pertama diberikan dengan gaji kebelakangan dan pampasan sebagai ganti pengembalian kerja berjumlah RM248,768. Mahkamah Perusahaan juga mendapati bahawa hukuman pembuangan kerja adalah terlalu keras. Perayu memohon untuk semakan kehakiman di Mahkamah Tinggi untuk membatalkan award Mahkamah Perusahaan tetapi permohonan ditolak.

Dalam rayuan ini, perayu merayu terhadap keputusan Mahkamah Tinggi yang mana mengesahkan award Mahkamah Perusahaan.

Diputuskan, mengetepikan perintah Mahkamah Tinggi dan award Mahkamah Perusahaan:

(1) Pertimbangan berhubung dalam perhubungan perusahaan adalah bahawa remedi yang dikenakan adalah wajar dan tidak seimbang dengan salah laku yang dilakukan. Pertimbangan mesti diambil kira bukan hanya perkara berkenaan kepentingan pihak yang melakukan salah laku, tetapi juga keseluruhan keadaan dalam kepentingan mengekalkan perhubungan perusahaan yang baik di tempat kerja (lihat perenggan 15).

(2) Walaupun Mahkamah Perusahaan tidak salah dalam mengambil kira pertimbangan perkara yang dibuatnya, ia gagal untuk mengambil kira perkara relevan yang lain yang sama dalam pertimbangan. Salah laku dalam kes ini adalah salah laku jika dilakukan oleh rakan sekerja di tempat kerja. Bahawa salah laku dilakukan oleh pegawai atasan meningkatkan lagi magnitud salah laku, kerana ia mengundang implikasi yang dia mengambil kesempatan ke atas pekerja bawahannya yang mungkin takut untuk membuat aduan. Bahawa salah laku dilakukan di tempat di mana mesin gergaji digunakan mencadangkan sikap tidak menghiraukan keselamatan. Bahawa ia dilakukan dalam penglihatan penuh pekerja-pekerja lain tidak membuatkannya menyenangkan. Ia hanya menghalang syak wasangka perkara buruk. Mangsa juga berpakaian lengkap dan dilindungi oleh baju kerjanya. Salah laku bukan tidak sengaja atau sentuhan fizikal tidak sengaja, tetapi sengaja. Jelas sekali Mahkamah Perusahaan gagal untuk melaksanakan bidang kuasanya secara adil dan ini mewajarkan pelaksanaan bidang kuasa pengawasan semakan kehakiman (lihat perenggan 16–17).

(3) Remedi yang diperlukan adalah bahawa salah laku tidak akan berlaku lagi. Tiada usaha untuk meminta maaf. Tiada keterangan mengenai apa-apa permintaan maaf sedemikian diterima oleh sesiapa di tempat kerja. Sebaliknya, pembelaan responden pertama adalah penafian. Ia menyiratkan tiada penyesalan. Adalah betul pengembalian kerja tidak boleh dipertimbangkan kerana ia akan meletakkan responden pertama dalam jawatan yang sama. Ia akan menyiratkan yang dia tidak melakukan salah laku. Walau bagaimanapun award sebagai ganti pengembalian kerja mengenakan hukuman ke atas perayu kerana memohon remedi salah laku di tempat kerja, apabila salah laku tersebut bukan tindakan atau dilakukan oleh perayu, tetapi semata-mata tindakan peribadi responden pertama (lihat perenggan 18).]

Notes

For cases on appeal to Court of Appeal, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 857–869.

Cases referred to

Dato' Seri Syed Hamid Albar bin Syed Jaafar Albar (Menteri Dalam Negeri) v SIS Forum (Malaysia) [2012] 6 MLJ 340; [2012] 9 CLJ 297, CA (folld)

Milan Auto Sdn Bhd v Wong Seh Yen [1995] 3 MLJ 537, FC (refd)

Mohd Zaihan Mohd Zain v Island & Peninsular Berhad [2008] 4 ILR 155, IC (refd)

Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan [2002] 3 MLJ 72; [2002] 4 CLJ 105, FC (folld)

Sunmugam a/l Subramaniam v JG Containers (M) Sdn Bhd [1998] MLJU 656; [2000] 6 CLJ 521, HC (refd)

Legislation referred to

Industrial Relations Act 1967 s 20

Rules of the High Court 1980 O 53

Appeal from: Application for judicial review No R4 (R2)–25–15 of 2009 (High Court, Kuala Lumpur)

N Sivabalah (E Reena with him) (Shearn Delamore & Co) for the appellant.

Cedric Nigel Miranda (Sri Dev Nair with him) (Cedric Miranda & Co) for the respondents.

Abdul Wahab Patail JCA (delivering judgment of the court):

[1] The appellant Freescale Semiconductor (M) Sdn Bhd appealed against the decision of the High Court which upheld Industrial Court Award No 2160/2008 dated 24 December 2008. At the end of the hearing the appeal was allowed, the order of the High Court and award of the Industrial Court were set aside.

BACKGROUND

[2] The first respondent Edwin Michael Jalleh ('the respondent') was a senior manufacturing supervisor. On 8 March 2005, he was given notice to show cause on allegations of misconduct on his part as follows:

(1) On 6 March 2005, had deliberately touched/pat Intan Nurulain, bdg No: 28529 at her buttock while she was working at the saw machine. She screamed at the instance when she realised what you did;

(2) Sometime last year, while you were in the lift together with employee Musliha, bdg no: 22366 and Yusnita bdg no: 24997, you deliberately tried to touch/pat her buttock and when asked by her why did you do that you answered that you wanted to know what was inside her pocket.

> The above actions are amounting (sic) to sexual harassment committed to co-workers/employees and considered as a very serious misconduct in our organisation.

[3] By letter 18 March 2005, the respondent denied the allegations.

[4] The respondent was informed that his explanation was held to be unsatisfactory and a domestic inquiry was scheduled for 30 March 2005. The proceedings were held on 30–31 March 2005. The domestic inquiry dismissed the second allegation but found the first allegation to be proved. A letter of dismissal was issued on 6 April 2005 that his employment was terminated with effect from 6 April 2005.

[5] The respondent filed a claim under s 20 of the Industrial Relations Act 1967 that his services had been terminated without just cause or excuse. He sought, inter alia, reinstatement.

[6] The matter was referred to the Industrial Court, which concluded that the respondent's dismissal was without just cause or excuse and ordered that the respondent be accorded with backwages and compensation in lieu of reinstatement amounting to RM248,768.

[7] Examination of the award shows that the Industrial Court found as follows:

> … The court believed COW2 and COW3 that the claimant had slapped COW2 on her buttocks. The claimant was a man who was very much older than COW2 who was a young female. The very act of the claimant slapping the buttocks of COW2 was an act of sexual harassment. The buttocks is a sensitive and private part of the anatomy. It was a grave and serious misconduct. The court did not believe the claimant that COW6 had plotted and instigated COW2 to make a false allegation against him.

[8] Notwithstanding that finding, the Industrial Court found the punishment of dismissal to be too harsh, reasoning that:

> In deciding whether the punishment was appropriate or too harsh, the court took into consideration the gravity of the offence, the events leading to that act and the circumstances of the incident such as the place of the misconduct and the amount of physical contact between the claimant and the victim. Although the victim and her female colleagues had laughed at the claimant, there was no provocation as the claimant was not angry with them.
>
> The incident happened in full view of the colleagues of the claimant and the victim. It was an open area on the factory floor and there were a number of factory operators working at their respective work stations. The claimant and the victim were attired

in smocks which were of knee length, masks with only the eyes exposed and caps. The victim's flesh was not violated by the claimant was it was protected by layers of cloth. The entire act of slapping the victim on her buttocks would have taken a few seconds. It was not a prolonged act. The victim had reacted in defence by screaming and scolding the claimant. There was no further danger to her as she was surrounded by her colleagues.

The court also took into consideration the character evidence given by CLW3 who was the claimant's subordinate; CLW4 who was his colleague and CLW5 who was a pastor of a church.

The court found that the punishment of dismissal was too harsh in the circumstances. The court held that the dismissal was without just cause or excuse.

[9] The High Court dismissed the application by the appellant herein for judicial review to quash the award of the Industrial Court.

The High Court did not err in holding that 'Whilst it is not disputed that sexual harassment is a serious misconduct, dismissal is not the only suitable and appropriate punishment'. Accordingly, the High Court proceeded:

> The (Industrial) Court in determining whether the punishment of dismissal was too harsh is perfectly entitled to take into account, as it had done above, the circumstances in which the incident took place and the character evidence of the first respondent.

[10] We remind ourselves that although this is an appeal from a decision of the High Court, it arose from an application for exercise of its supervisory jurisdiction under O 53 of the Rules of the High Court 1980.

[11] The matters the Industrial Court had taken into account, referring to the respondent who was the applicant in the Industrial Court, were as follows:

(a) the incident happened in full view of the colleagues of the applicant and the victim. It was an open area on the factory floor and there were a number of factory operators working at their respective work stations;

(b) the applicant and the victim were fully attired in smocks which were of knee-length, masks with only the eyes exposed and caps;

(c) the victim's flesh was not violated by the applicant as it was protected by layers of cloth;

(d) the entire act of slapping the victim on her buttocks would have taken a few seconds. It was not a prolonged act;

(e) the victim had reacted in defence by screaming and scolding the applicant;

(f) there was no further danger to her as she was surrounded by her colleagues; and

(g) the character evidence given by CLW3 who was the applicant's subordinate; CLW4 his colleague and CLW5 who was a pastor of a church.

[12] Quite properly the High Court followed the Federal Court in *Milan Auto Sdn Bhd v Wong Seh Yen* [1995] 3 MLJ 537 (FC) that the functions of the Industrial Court are two-fold, (a) to determine whether the misconduct complained of by the employer has been established; and (b) whether the proven misconduct constituted just cause or excuse for the dismissal.

[13] The error, in our view, however was going beyond the concept of just cause or excuse for the dismissal and to consider dismissal as punishment, thereby leading, as it did in *Sunmugam a/l Subramaniam v JG Containers (M) Sdn Bhd* [1998] MLJU 656; [2000] 6 CLJ 521, to the discussion of an enlightened approach to punishment, that punishment is imposed not in order to seek retribution or to give vent to feeling of wrath, that its main purpose of a punishment is to correct the fault of the employee concerned, that it is not expedient in the interest of the administration to visit every employee against whom a fault is established with the penalty of dismissal and to get rid of them, that the penalty imposed is commensurate with the magnitude of the fault.

[14] Without digressing to the merits and purpose of punishment, the trite law is that to justify dismissal of an employee there has to be established such a misconduct that was serious enough to justify the remedy of a dismissal: see *Mohd Zaihan Mohd Zain v Island & Peninsular Berhad* [2008] 4 ILR 155, although even in that case looking at the misconduct as an 'offence' led to a holding that 'The company is expected to consider any extraneous matters such as length of service and previous good conduct which may act in mitigation of the offence'. That such factors are described as 'extraneous matters' indicates they are not the considerations that would necessarily drive the decision.

[15] With respect, in our view, the germane consideration in industrial relations is that the remedy imposed is warranted and not disproportionate to the misconduct committed. Consideration must be taken not only of matters concerning the interests of the party who committed the misconduct, but also the whole of the circumstances in the interests of maintenance of good industrial relations in the workplace.

[16] In our view, although the Industrial Court was not wrong in taking into consideration the matters that it did, it failed to take other equally relevant

matters into consideration. The misconduct in this case is misconduct if committed by a peer in the workplace. That the misconduct was committed by a superior, for the respondent was the senior manufacturing supervisor, increases the magnitude of the misconduct, as it invites the implication he was taking advantage of his subordinate who might be afraid to complain. That the misconduct was committed in a place where a saw machine is used suggests a certain disregard for safety. That it was committed in full view of other employees does not make it any less objectionable. It merely excludes suspicions of worse things. Likewise, that fact that the victim was fully attired and protected by her work clothes. The misconduct was not of any inadvertent or accidental physical contact, but wilful. One must expect in a multicultural society such as in this country, that the workplace is also multicultural. In such multicultural work environment, industrial harmony, one of if not the main object(s) of industrial relations, is achieved not by one acting on the norms acceptable to himself, but he must be sensitive to what is acceptable by others.

[17] The foregoing from para 13 is not an elaboration of our consideration of the matters as an appeal, but to illustrate how those matters if taken into consideration could have affected the determination of the award, and thereby demonstrate that the matters ought to have been considered. It would be a different matter if the Industrial Court took those matters into consideration but dismissed them. But in this case, these matters were not taken into consideration at all. In so failing, quite clearly the Industrial Court had failed to exercise its jurisdiction fairly or justly and warranted the exercise of the supervisory jurisdiction of judicial review.

[18] Further, the required remedy is that the misconduct does not occur again. There is no effort to apologise. There is no evidence of any such apology and that such apology was accepted by those in the workplace. Instead, the respondent's defence was of denial. It implies a lack of contriteness. Quite correctly reinstatement could not be considered as it would put the respondent into the same position. It would have implied he committed no misconduct. But an award in lieu of reinstatement imposes a punishment upon the appellant for seeking to remedy misconduct in the workplace, when the misconduct is not the act of or contributed to by the appellant, but solely the personal act of the respondent. Quite plainly the order falls into the irrationality test adopted by the Federal Court in *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72; [2002] 4 CLJ 105 (FC), followed by this court in *Dato' Seri Syed Hamid Albar bin Syed Jaafar Albar (Menteri Dalam Negeri) v SIS Forum (Malaysia)* [2012] 6 MLJ 340; [2012] 9 CLJ 297 (CA), and warrants the exercise of the same supervisory jurisdiction.

[19] Accordingly, we set aside the order of the High Court and the award of the Industrial Court.

Order of High Court and award of Industrial Court set aisde.

Reported by Afiq Mohamad Noor